No. 02-322

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IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES,
Petitioner,

v.

CITY OF CHICAGO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

SUPPLEMENTAL BRIEF FOR THE RESPONDENT

MICHAEL J. HAYES
S. PATRICK MICKEY
JOHN T. ROACHE
JOEL GRISWOLD
GARDNER CARTON & DOUGLAS
Suite 3700
191 N. Wacker Drive
Chicago, IL 60606
(312) 569-1000

MARA S. GEORGES
Corporation Counsel of the City of Chicago
LAWRENCE ROSENTHAL *
Deputy Corporation Counsel
BENNA RUTH SOLOMON
Chief Assistant Corporation Counsel
DAVID A. GRAVER
Assistant Corporation Counsel
City Hall, Suite 600
121 North LaSalle Street
Chicago, Illinois 60602
(312) 744-5337

Attorneys for Respondent

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT	1
ARGUMENT	1
CONCLUSION	8

TABLE OF AUTHORITIES

CASES	Page
County of Yakima v. Confederated Tribes and Bands, 502 U.S. 251 (1992)	4
Hagen v. Utah, 510 U.S. 399 (1994)	4
J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred International, Inc., 534 U.S. 124 (2002)	4
Morton v. Mancari, 417 U.S. 535 (1974)	4
Plaut v. Spendthrift Farm, Inc. 514 U.S. 211 (1995)	3
Traynor v. Turnage, 485 U.S. 535 (1988)	4
TVA v. Hill, 437 U.S. 153 (1978)	7
United States v. Will, 449 U.S. 200 (1980)	4
STATUTES	
5 U.S.C. § 552(a)(4)(B) (2000)	2
5 U.S.C. § 552(a)(4)(i)-(iv) (2000)	5-6
5 U.S.C. § 552(b) (2000)	2
Consolidated Appropriations Resolution, 2003, H.J. Con. Res. 2, Div. J, Tit. 6, § 644, 108th Cong., at 110-11 (2003)	1-2
RULE	
Sup. Ct. R. 25.5	1

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STATEMENT

We file this supplemental brief pursuant to this Court's Rule 25.5 to address the effect of the Consolidated Appropriations Resolution, 2003, on this case. The petitioner noted in its opening brief that this legislation had been proposed, but because the legislation had not been enacted until after we had filed our principal brief, we did not address it in that brief.

ARGUMENT

Section 644 of Division J of the newly enacted Consolidated Appropriations Resolution provides:

> No funds appropriated under this Act or any other Act with respect to any fiscal year shall be available to take any action based on any provision of 5 U.S.C. 552 with

> respect to records collected or maintained pursuant to 18 U.S.C. 846(b), 923(g)(3) [with respect to multiple sales of handguns] or 923 (g)(7) [with respect to firearms recovered in the course of criminal investigations], or provided by Federal, State, local, or foreign law enforcement agencies in connection with arson or explosives incidents or the tracing of a firearm, except that such records may continue to be disclosed to the extent and in the manner that records so collected, maintained, or obtained have been disclosed under 5 U.S.C. 552 prior to the date of the enactment of this Act.

Consolidated Appropriations Resolution, 2003, H.J. Con. Res. 2, Div. J, Tit. 6, § 644, 108th Cong., at 110-11 (2003).[1] This provision appears to bar petitioner, the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"), from spending appropriated funds to disclose under the Freedom of Information Act ("FOIA") multiple sales or trace data other than data it has previously disclosed. It does not, however, affect the case before this Court. At most, section 644 will bar ATF from spending appropriated funds to comply with the district court's judgment if it is upheld by this Court, but under FOIA, ATF does not need to rely on appropriated funds to disclose data. Instead, FOIA authorizes ATF to charge Chicago for those costs. Thus, nothing in section 644 renders the judgment below unenforceable.

We begin by observing that FOIA specifically grants the district courts "jurisdiction to enjoin [an] agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B) (2000). While certain agency records are exempt from this disclosure obligation (see *id.* § 552(b)), the district court ruled that none of those

[1] As we file this supplemental brief, this legislation has not yet appeared in Statutes at Large, and accordingly we cite to the legislation in the form that it appeared when it was passed by both Houses of Congress.

exemptions was applicable to the multiple sales and firearms trace data at issue in this case. That ruling was upheld on appeal, and we vigorously defend it in our principal brief. Section 644 does not expressly modify any of the provisions of FOIA on which the district court relied to enjoin ATF to disclose the multiple sales and trace date at issue in this case. In particular, section 644 does not purport to expand any of the exemptions to the obligation of disclosure found in FOIA; and it does not purport to limit the jurisdiction of the federal courts to order disclosure of agency records that are improperly withheld under FOIA.

Precisely because section 644 does not amend any of the provisions of FOIA at issue in this case, it has no obvious effect on this case. Indeed, even once this case returns to the district court, it is far from clear that section 644 would prevent the district court from enforcing its judgment ordering ATF to disclose multiple sales and trace data. Section 644 does not in terms prohibit ATF from complying with injunctive decrees, and it is at best uncertain that the costs of complying with the district court's judgment are costs "based on any provision of 5 U.S.C. 552" within the meaning of section 644, rather than costs "based on" the judgment of a federal court. Moreover, a construction of section 644 as effectively nullifying the judgments of the federal courts in FOIA cases by instructing federal agencies to spend no funds to disclose information pursuant to those judgments, while at the same time failing to alter the substantive law that gives rise to those judgments, would raise a serious constitutional question about whether Congress had overstepped its constitutional authority. See generally, *e.g.*, *Plaut v. Spendthrift Farm, Inc.* 514 U.S. 211 (1995). But the Court need not reach that question here, nor need it decide whether section 644 is applicable to this case, since, as we now explain, section 644, even if it is applicable to this case, addresses only how the costs of complying with a district court's judgment are to be borne, and not any of the

substantive issues of FOIA law presented by the case now before this Court.

Since section 644 does not expressly alter any of the substantive provisions of FOIA on which the lower courts relied to order ATF to disclose the data at issue in this case, to read section 644 to deprive the district court of the authority to issue the injunction now under review would mean that section 644 has implicitly repealed the authority that FOIA grants the district courts to enjoin federal agencies to disclose information improperly withheld under FOIA. Implied repeal of legislation is disfavored, however, since "if Congress had meant to repeal any part of the other previous statute, it could have easily done so." *Hagen v. Utah*, 510 U.S. 399, 416 (1994). Accord, *e.g.*, *County of Yakima v. Confederated Tribes and Bands*, 502 U.S. 251, 262 (1992); *Traynor v. Turnage*, 485 U.S. 535, 547-48 (1988). And "[t]his rule applies with especial force when the provision advanced as the repealing measure was enacted as an appropriations bill." *United States v. Will*, 449 U.S. 200, 221-22 (1980). Even more important, "the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred International, Inc.*, 534 U.S. 124, 141-42 (2002) (quoting *Morton v. Mancari*, 417 U.S. 535, 550 (1974)). Where there is such an inconsistency, however, even appropriations legislation can impliedly repeal substantive law. See, *e.g.*, *Will*, 449 U.S. at 483-85. But here, section 644 can readily be reconciled with the substantive provisions of FOIA on which the district court relied to issue the judgment at issue in this case.

Section 644, by its terms, does not forbid ATF from disclosing multiple sales or trace data; at most, it prevents ATF from spending appropriated funds to make such disclosures. But under FOIA, ATF has no need to spend appropriated funds in order to disclose information subject to

FOIA. Instead, FOIA empowers ATF and other federal agencies to charge requesters for the costs of disclosing records under FOIA:

> (4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.
>
> (ii) Such agency regulations shall provide that—
>
> (I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;
>
> (II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and
>
> (III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.
>
> (iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it will contribute significantly to public understanding of the operations or activities of the

government and is not primarily in the commercial interest of the requester.

(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section—

> (I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or
>
> (II) for any request described in clause (ii)(II) or (III) of this subparagraph for the first two hours of search time or for the first hundred pages of duplication.

5 U.S.C. § 552(a)(4)(i)-(iv) (2000). These provisions, complicated though they are, plainly authorize federal agencies to charge for all costs of document search and duplication that may be involved in complying with a district court's injunction to disclose information under FOIA. And section 644 did not repeal this authority. At most, to the extent that section 644 is inconsistent with those portions of FOIA that direct agencies to waive or reduce fees when disclosure is sought for noncommercial reasons or would advance a public interest, as well as the provision that directs agencies not to charge for the first two hours of search time or first hundred pages of duplication, it impliedly repeals those provisions. But nothing in section 644 is inconsistent with the balance of FOIA, including its provisions authorizing agencies to charge for all reasonable costs of searching for and producing

requested information. And, as we explain above, to the extent that appropriations legislation can be harmonized with substantive law, it should not be read to change substantive law. Indeed, when there is no actual inconsistency between appropriations legislation and prior substantive law, this Court will not find an implied repeal even when the appropriations legislation may have been motivated by legislators' concerns about how the lower courts had construed the substantive legislation. See, *e.g.*, *TVA v. Hill*, 437 U.S. 153, 190-93 (1978).

In short, not only does section 644 fail to expressly repeal or otherwise alter any of the substantive provisions of FOIA at issue in the case before the Court, but it is readily harmonized with those provisions in FOIA on which the lower courts relied to order ATF to disclose the multiple sales and trace data at issue in this case. For that reason, the limited effect of this appropriations provision is clear. First, because FOIA grants ATF ample authority to charge Chicago for its costs of searching for and producing data under the district court's judgment, ATF need not rely on any appropriated funds in order to produce the data that the district court ruled it had improperly withheld. While section 644 may well represent a congressional determination that federal taxpayers should not foot the bill for producing multiple sales and trace data under FOIA, it is nothing more than that. Second, because FOIA authorizes ATF to charge Chicago for its costs of complying with the judgment at issue in this case, nothing in section 644 renders the district court's judgment unenforceable or otherwise bears on the propriety of that judgment. Third, although the district court, on remand, will be required to take care that its judgment, if affirmed by this Court, is enforced in a manner consistent with section 644, that provision will have no other bearing on this litigation. Certainly section 644 has no bearing on either of the questions presented by ATF's petition for certiorari, which go only to whether the district court properly ordered

multiple sales and trace data disclosed, and do not involve any question about who should bear the costs of compliance with the district court's order. Accordingly, section 644 supplies no basis to vacate the judgment below, nor does it otherwise affect the case before this Court.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

MICHAEL J. HAYES
S. PATRICK MICKEY
JOHN T. ROACHE
JOEL GRISWOLD
GARDNER CARTON & DOUGLAS
Suite 3700
191 N. Wacker Drive
Chicago, IL 60606
(312) 569-1000

MARA S. GEORGES
Corporation Counsel of the
City of Chicago
LAWRENCE ROSENTHAL *
Deputy Corporation Counsel
BENNA RUTH SOLOMON
Chief Assistant Corporation
Counsel
DAVID A. GRAVER
Assistant Corporation Counsel
City Hall, Suite 600
121 North LaSalle Street
Chicago, Illinois 60602
(312) 744-5337

Attorneys for Respondent

* Counsel of Record